STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 1, 2005
v	No. 254896 Oakland Circuit Court
ANTHONY GERARD DOWELL, Defendant-Appellant.	LC No. 2003-190533-FC

Before: Saad, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals his jury trial conviction of first-degree premeditated murder, MCL 750.316(1)(a), for fatally stabbing his wife in the presence of their young daughter. We affirm.

I. Premeditation and Deliberation

We reject defendant's claim that there is insufficient evidence of premeditation and deliberation to support his bindover on a charge of first-degree murder.

To bind a defendant over for trial, the district court must find that a felony was committed and that there is probable cause to believe that the defendant committed the crime. MCL 766.13; *People v Terry*, 224 Mich App 447, 451; 569 NW2d 641 (1997).[1] A circuit court may reverse a bindover decision only if the record shows that the district court abused its discretion. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). We review a circuit court's decision on a motion to quash de novo to determine if the district court abused its discretion. *Id.*

[1] Probable cause to bind a defendant over for trial exists "where the court finds a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person to believe that the accused is guilty of the offense charged." *People v Orzame*, 224 Mich App 551, 558; 570 NW2d 118 (1997). There must be some evidence from which to infer each element of the crime, but the prosecution is not required to prove each element beyond a reasonable doubt. *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997). If there is credible evidence offered to both support and negate an element of the crime, a factual question exists that should be left to the jury. *Id.*

Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Further:

> The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing. [*People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992).] Premeditation may be established through evidence of the following factors: (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide. [*Id.*[2]]

We agree with both the district court and the circuit court that defendant's statement to his cousin that he had been planning "for this" to happen, supported a bindover on the charge of first-degree murder. A factfinder could infer from this conversation that defendant alluded to his plan to kill his wife. Clearly, this is sufficient evidence of premeditation and deliberation to support the bindover decision. And, though defendant disputes the meaning of his statement, this was a question of fact to be resolved by the jury. *People v Reigle*, 223 Mich App 34; 566 NW2d 21 (1997).[3]

We also reject defendant's claim that the prosecutor presented insufficient evidence of premeditation and deliberation at trial.[4] In addition to defendant's admission to his cousin that he planned to kill the victim, other circumstantial evidence supported his conviction. The record reflects that defendant went to the victim's workplace and waited for her co-worker to leave. After the co-worker left, defendant lured the victim to his car to kiss their child goodbye. He

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[2] If the killing involves a fight, there must be evidence of "a thought process undisturbed by hot blood" to prove first-degree murder. *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998), quoting *People v Morrin*, 31 Mich App 301, 329-330; 187 NW2d 434 (1971). Circumstantial evidence and any reasonable inferences that can be drawn from the evidence may be sufficient to prove the elements of the crime. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999).

[3] Furthermore, were we to find an error in his bindover, it would be harmless because there was sufficient evidence of first-degree premeditated murder presented at trial. *People v Dunham*, 220 Mich App 268, 276-277; 559 NW2d 360 (1996).

Defendant also argues that the trial court erred by denying his request for a continuance to file an interlocutory appeal of the bindover decision. A trial court may, in its discretion, grant an adjournment to promote the cause of justice. *People v Walter Jackson, Jr*, 467 Mich 272, 276; 650 NW2d 665 (2002). We review a trial court's decision whether to grant a continuance for an abuse of discretion. *Id.* Here, the trial court correctly found no merit in defendant's motion to quash the information. Any interlocutory appeal of the issue would have been unsuccessful. Thus, the trial court did not abuse its discretion.

[4] An appellate court's review of the sufficiency of the evidence to sustain a conviction does not turn on whether there was any evidence to support the conviction, but whether there was sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The evidence must be viewed in a light most favorable to the prosecution. *Id*. at 514-515.

then used a metal pipe and knives that he had brought with him to kill the victim. During the attack, defendant stabbed the victim repeatedly, and there were defensive wounds on the victim. Before striking the victim, defendant "asked for God's forgiveness" for what he was about to do. According to Larry Gilyard, shortly before the attack, defendant called the victim's home and spoke to a man whom he thought was the victim's boyfriend. The jury could infer from this evidence that defendant was upset that the victim was seeing another man, formed a plan to kill her, armed himself with a metal pipe and knives, went to her workplace, waited until she was alone, lured her into his car, and then repeatedly stabbed her to death. This evidence was clearly sufficient to establish premeditation and deliberation and, therefore, the trial court did not err when it denied defendant's motion for a directed verdict.

II. Prior Bad Acts

Defendant also challenges the trial court's ruling regarding the admissibility of evidence of his prior bad acts. Before trial, the prosecutor filed a notice of her intent to offer evidence of defendant's involvement in two prior assaults, pursuant to MRE 404(b). Defendant objected and the prosecutor agreed that the evidence was not admissible for a proper purpose under MRE 404(b). The parties then stipulated that the prosecutor would only offer the evidence if defendant first offered evidence of his nonviolent character. At least one month before trial, defendant knew that the challenged evidence would not be offered unless he first presented evidence of his nonviolence.

To the extent defendant argues that the trial court improperly agreed that the evidence was admissible under MRE 404(b), he is mistaken. As noted, the parties agreed that the evidence was not admissible under this rule, and instead would only be offered as rebuttal evidence, apparently under MRE 404(a)(1), if defendant opened the door to its admission. See *People v Lukity*, 460 Mich 484, 497-499; 596 NW2d 607 (1999). The trial court did not rely on MRE 404(b) when it conditionally allowed the evidence.

Further, we reject defendant's argument that the trial court erred by delaying its ruling regarding the admissibility of this evidence until the time of trial. Defendant maintains that this alleged delay had a chilling effect on his decision to testify. The trial court's announcement at trial that the evidence could be offered only if defendant first presented evidence of his nonviolent character was consistent with its earlier ruling, made more than a month before trial. The court merely explained at trial that it would delay ruling on whether defendant actually opened the door to the evidence until it heard defendant's testimony. Defendant was sufficiently advised in advance of trial of the circumstances under which the evidence would be allowed and had ample time to decide whether to testify.[5] Accordingly, defendant has failed to establish any error on this basis.[6]

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[5] Defendant also contends that the trial court erroneously admitted a videotaped recording of his statement to the police. Defendant asserts that the tape was of such poor quality that it was not properly authenticated, a prerequisite to its admissibility.

The poor quality of the videotape is not disputed and the audio portion is virtually unintelligible. Before trial, defendant moved to suppress his statement, arguing in part that

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III. Ineffective Assistance of Counsel

In a supplemental pro se brief, defendant avers that trial counsel was ineffective. Because defendant did not raise this issue below in an appropriate motion for a new trial or evidentiary hearing, our review is limited to mistakes apparent from the record. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992).[7]

Defendant claims that his counsel was ineffective for (1) not presenting an insanity defense at trial, (2) not using the services of a private investigator or DNA expert, (3) failing to exclude Linda Bare's testimony, and (4) not being prepared for Larry Gilyard's testimony at trial.

Before trial, defense counsel withdrew the insanity defense because defendant's expert witness could not support it. Defendant has not identified any evidence supportive of an insanity defense and, therefore, has not shown that counsel's decision to withdraw the insanity defense

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because the quality of the videotape was so poor, the officer who took his statement should also be barred from testifying about the substance of defendant's statement. The trial court disagreed and denied defendant's motion to suppress. Defendant never argued below that the videotape was inadmissible because it was not properly authenticated under MRE 901. Instead, at trial, it was defense counsel who requested that the jury view the videotape in its entirety. Because defendant never challenged the authenticity of the videotape below, and it was defendant who requested that the jury view the videotape at trial, defendant waived any challenge in this regard. See *People v Riley*, 465 Mich 442, 448-449; 636 NW2d 514 (2001).

Furthermore, even if we review this as an unpreserved issue subject to review for plain error affecting defendant's substantial right, *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), appellate relief is not warrant because it is neither clear nor obvious that the videotape was not authentic. Therefore, plain error has not been shown. *Id.* Moreover, as a matter of constitutional law, the fact that a clear recording of defendant's statement was not made does not establish a due process violation. See *People v Geno*, 261 Mich App 624, 627-628; 683 NW2d 687 (2004).

[6] Defendant also says the trial court erred by denying his motion for a new trial. Defendant principally argues that he was entitled to a new trial because of the trial court's erroneous decision to allow the prosecutor to introduce evidence of his prior assaults, thereby causing him to elect not to testify. As previously discussed, the trial court did not err in its consideration of this evidentiary issue, and did not improperly delay ruling on this issue. Thus, the trial court did not abuse its discretion by denying defendant's motion for a new trial on this basis. See *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

[7] To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996).

deprived him of a substantial defense. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

The record reflects that the trial court granted defendant's pretrial motion for appointment of a private investigator and a DNA expert to assist in his defense. Defendant claims that trial counsel failed to utilize the services of either, but the existing record does not support this claim. See *People v Rockey*, 237 Mich App 74, 77; 601 NW2d 887 (1999). Further, defendant has not made an offer of proof to explain how an investigator or a DNA expert could have aided his defense, so we decline defendant's request for a remand on this issue.

Defendant also argues that counsel was ineffective for failing to investigate Linda Bare's credibility as a witness. He maintains that counsel should have used Bare's testimony from other hearings to impeach her trial testimony. Once again, however, absent an explanation from counsel regarding this matter of trial strategy, it is not apparent that counsel was ineffective. *Rockey, supra*. Moreover, defendant relies on testimony that Bare gave at a hearing after defendant's trial to argue that counsel failed to adequately impeach Blair at trial. Counsel cannot be faulted for failing to utilize this testimony, which did not exist at the time of trial.[8]

Defendant also says that counsel was ineffective because he was unprepared for Larry Gilyard's trial testimony. We find no merit to this argument. Gilyard previously asserted his Fifth Amendment privilege and declined to testify at defendant's preliminary examination. He was listed as a witness for trial, but it was anticipated that he would also assert his Fifth Amendment privilege if called at trial. On the fourth day of trial, defense counsel was advised that Gilyard had decided to testify. Counsel unsuccessfully objected to Gilyard's testimony, and then requested that the trial court thoroughly examine him regarding his decision to testify. On this record, defendant has not demonstrated any deficiency by trial counsel with respect to Gilyard's testimony. Moreover, the existing record does not support defendant's claim that counsel was ineffective for not calling Lieutenant Peters to impeach Gilyard. This was a matter of trial strategy and defendant has not shown that counsel's handling of this matter was unsound. *People v Marcus Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).[9]

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[8] Also, defendant has not shown that a pretrial motion in limine regarding Bare's testimony (that counsel withdrew before trial) would have been successful.

[9] Defendant further contends that the trial court erred by denying his request for an evidentiary hearing on his claim of ineffective assistance of counsel. The trial court did not abuse its discretion by denying defendant's request for evidentiary hearing without a proper offer of proof or even an explanation of what other evidence defendant believed should have been presented at trial. See *People v Simmons*, 140 Mich App 681, 685-686; 364 NW2d 783 (1985). Moreover, defendant's claim that his attorney was ineffective for not requesting instructions on self-defense and insanity is not supported by the record. Rather, the record indicates that the trial court instructed the jury on self-defense. Further, defense counsel withdrew the insanity defense before trial because defendant's expert could not support it. Because it was apparent from the record that there was no merit to defendant's claim that trial counsel was ineffective for not requesting these instructions, the trial court properly determined that an evidentiary hearing was not necessary.

IV. Production of Evidence

We also reject defendant's claim that his right to due process was violated because the prosecutor failed to produce exculpatory evidence under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Defendant specifically claims that the prosecutor failed to submit a towel for DNA testing. The trial court granted defendant's request for DNA testing of several items, but defendant never requested testing of the towel. Significantly, defendant does not contend that he was unaware of the towel.

There is a distinction between the failure to develop evidence and the failure to disclose evidence. *People v Derrick Vaughn*, 200 Mich App 611, 619; 505 NW2d 41 (1993), rev'd on other grounds 447 Mich 217 (1994). The police are not under a duty to seek and find exculpatory evidence. *People v Michael Miller (After Remand)*, 211 Mich App 30, 43; 535 NW2d 518 (1995). This case is similar to *Vaughn, supra* at 619, in which this Court held that the prosecution did not violate the defendant's rights by failing to perform DNA testing. Further, defendant could have requested DNA testing of the towel before trial, but did not do so. He has not established a *Brady* violation with respect to this evidence.

Defendant also claims that the prosecution failed to turn over a handwritten statement from Larry Gilyard. Though Gilyard insisted at trial that he gave the police his own handwritten statement, the police denied receiving such a statement, nor was any such statement found upon investigation. On this record, defendant has failed to satisfy the first prong of the *Brady* test – he has not shown that the prosecution possessed this evidence. Accordingly, he has failed to establish a due process violation.

Similarly, defendant claimed that the police had photographs taken of him shortly after his arrest. The prosecutor was ordered to produce the photographs, but the police denied taking any photographs and were only able to locate the single booking photograph taken at the time of defendant's arrest. The trial court found that the police testimony regarding the photographs was credible. Giving deference to the trial court's resolution of this credibility dispute, *People v Tanner*, 255 Mich App 369, 412; 660 NW2d 746 (2003), rev'd on other grounds 469 Mich 437 (2003), defendant has again failed to meet the first prong of the *Brady* test, because he has not shown that the prosecution or the police were in possession of the photographs.[10]

[10] Defendant also refers to a request he made for his daughter's birth certificate. This evidence does not fall under the *Brady* rule because defendant was aware of the evidence and there is nothing in the record to suggest that the prosecution suppressed it. *People v Lester*, 232 Mich App 262; 591 NW2d 267 (1998).

Affirmed.[11]

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Jane E. Markey

[11] Because we have rejected defendant's various claims of error, defendant is not entitled to a new trial due to the cumulative effect of his alleged errors. *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002).